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NO. 87-488

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL MARINE SERVICES, INC., ET AL.,
Petitioner

VERSUS

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO (herein, "the SIU"), submits this brief in opposition to the request of Petitioner, National Marine Services, Inc. (herein, "National Marine" or "the Company"), that a Writ of Certiorari issue to review the mandate and opinion of the United States Court of Appeals for the Fifth Circuit. The court below correctly applied the extant precedents of this court in concluding that National Marine was obligated to arbitrate the SIU's grievances after expiration of the collective bargaining agreement and the SIU's grievances are arbitrable.

COUNTERSTATEMENT OF THE CASE

A. Statement Of Material Facts

Since 1961, the SIU has represented two bargaining units of employees employed by National Marine: unlicensed personnel, which include vessel crew personnel and shore based tankermen "employed on tugboats,

towboats...and/or barges owned or operated by the Company," and licensed personnel, which include captains and engineers. Although there were separate collective bargaining agreements for each unit, many of the terms of each were identical.

Each agreement contained the same broad arbitration clause. The clause states, in pertinent part:

> All complaints, disputes or grievances arising between the parties hereto relating to or in connection with or involving questions of interpretation or application of any clause of this Agreement, or any acts or conduct or relations between the parties directly or indirectly, shall be processed pursuant to this Article.

The agreements also contained provisions which prohibited the Company from subcontracting work.

By letter dated September 26, 1985, National Marine informed the SIU that it had entered into an agreement to sell 14 of its 18 towboats to Compass Marine, Inc. (herein, "Compass"). At the same time, National Marine and Compass also entered into a towage contract whereby Compass agreed to dedicate the 14 towboats to move exclusively National Marine's barges for a five-year period.

By written grievance dated September 27, 1985, the SIU alleged that the proposed sale was a sham and, with the towage agreement, in derogation of the subcontracting clauses of the agreements, and that the unilateral layoff of tankerman from National Marine's barges (which it continued to own and operate) was in violation of the

recognition clauses of the agreements.[1] National Marine having denied the grievances, the SIU requested on October 4 that the grievances be arbitrated. National Marine refused to arbitrate.

B. Decision of The Court Below

In finding that National Marine is obligated to arbitrate the SIU's grievances although the contracts have expired, the Court of Appeals noted that the grievances were filed and arbitration was requested while the agreements were in effect; that the grievances arose under express terms of the contracts; and that the arbitration clause, which the court below commented was "as broad as any that we have seen" (Pet.App. at A-11),[2] was not negated expressly or by clear implication. Refusing to delve into the merits of the grievances as requested by National Marine, the court below further concluded that the SIU's grievances are arbitrable, in accordance with *AT&T Technologies, Inc. v. Communications Workers of America*,__ U.S. __, 106 S.Ct. 1415 (1986).

SUMMARY OF THE ARGUMENT

The Fifth Circuit Court of Appeals, following the

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[1] October 9, 1985 was established as the closing date of the sale of the vessels to Compass. Although all SIU bargaining unit personnel were laid off and replaced by Compass's employees, the sale was not consummated as scheduled. The financing for the sale had not been arranged (no bank had yet been selected) and no security was tendered, and National Marine could not produce clear title to the vessels. Yet, Compass's employees boarded the National Marine towboats in midstream on October 9, and using this same equipment, continued to push National Marine barges.

[2] References to Petitioner's Brief are abbreviated as "Pet.Br. at __." References to the Appendix to Petitioner's Brief are abbreviated as "Pet.App. at __."

guidelines previously established by this Court, correctly concluded that the parties' unusually broad arbitration clause demonstrated their agreement to arbitrate disputes after the expiration of the contract. The court below in particular relied upon this Court's precedents which establish that where the parties have agreed to a broad arbitration clause, it is to be strongly presumed that they have also agreed to arbitrate the same issues after the expiration date of the contract.

No conflict exists between the courts of appeals which warrants the issuance of a writ of certiorari. The SIU's grievances are arbitrable under the various standards established by the courts of the appeals, including that set forth by the Eighth Circuit. Any divergence between the appeals courts is, accordingly, of no moment to the resolution of the instant matter.

Having first concluded the Company was obligated to arbitrate disputes after contract expiration, the court below properly determined that the SIU's grievances are arbitrable, in accordance with the longstanding precedents of this Court. Rather than resolving the grievances on their merits, as urged by National Marine, the appeals court appropriately left it to the arbitrator.

REASONS FOR DENYING THE WRIT

A. THE ISSUE WHETHER AN EMPLOYER IS OBLIGATED TO ARBITRATE GRIEVANCES AFTER CONTRACT EXPIRATION WAS SETTLED BY THIS COURT; THE DECISION BELOW IS SQUARELY IN ACCORD WITH APPLICABLE TENETS.

Grievances grounded on the provisions of a collective

bargaining agreement which contains an arbitration clause are arbitrable after the expiration of the agreement if they are filed within a reasonable time after contract expiration, unless the presumptions favoring arbitrability have been negated expressly or by clear implication. *Nolde Bros. Inc. v. Local 358, Bakery Workers Union*, 430 U.S. 243, 255 & n.8 (1977). The strong presumption of postexpiration arbitrability grows out of the "well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements." *id.*, 430 U.S. at 254. Consequently, the focus of judicial contemplation of the parties' intention to arbitrate disputes after contract arbitration must be on the scope of the arbitration clause; the broader the range of arbitrable issues, the greater the presumption of an agreement to arbitrate disputes after the expiration of the contract. *id.*, 430 U.S. at 251-252, relying upon *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 553 (1964). *See Piano Workers v. W.W. Kimball Co.*, 379 U.S. 357 (1964), *rev'g* 333 F.2d 761 (7th Cir.) (summarily reversing on the basis of *John Wiley & Sons* the lower court's opinion that a postcontract dispute which arose after the expiration of the agreement was not arbitrable).

Here, the grievances were filed during the life of the agreements, not after they expired, and the demand to arbitrate was likewise made during the life of the agreement. The grievances were based on actions taken by National Marine during the life of the agreement: the simultaneous entering into of a sale agreement and exclusive towage agreement with Compass. It was these events which triggered the grievances, contrary to National Marine's assertions. Since these matters arose under the contract, the expiration of the contracts does not terminate the Company's obligation to arbitrate. *Nolde Bros.*, 430 U.S. at 251; *John Wiley & Sons, Inc.*, 376 U.S. at 543 (holding severance pay dispute arising after expiration of the contract was

arbitrable, where plant had shut down, and grievances were filed and arbitration demanded prior to shutdown.).

Indeed, in *Nolde Bros.* this Court rejected the contention "that termination of a collective bargaining agreement automatically extinguishes a party's duty to arbitrate grievances arising under the contract. Carried to its logical conclusion that argument would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination." 430 U.S. at 251.

National Marine contends that *Nolde Bros.* stands for the proposition that only rights which "accrue" during the term of a contract--such as severance pay--are arbitrable after expiration of the contract. (Pet.Br. at 8.) But the "accrued" rights standard was, as the Fifth Circuit stated, squarely before this Court in *Nolde Bros.* because it was the foundation of the decision of the Fourth Circuit Court of Appeals in *Local 358, Bakery & Confectionary Workers Union v. Nolde Bros., Inc.*, 530 F.2d 548 (4th Cir. 1975). Chief Justice Burger's opinion, although affirming the mandate of the Fourth Circuit, rejected the narrow holding and drew no distinction between so-called accrued rights and rights which arise under the terms of a contract. *See Local Jt. Exec. Bd. v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 881 (1987); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 861 (3d Cir.), *cert. denied*, 454 U.S. 1031 (1981) (rejecting contention that only rights accruing under contract prior to termination are arbitrable).

That there was an agreement to arbitrate disputes arising under the contract after its expiration is plain from the exceptionally broad arbitration clause, and the court below so found. In addition to matters of contract

interpretation, the parties agreed to arbitrate "*any acts, conduct or relations between the parties, directly or indirectly,*" establishing an exceptionally broad range of arbitrable issues. "The parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationships." *Nolde Bros.*, 430 U.S. at 1074. The Fifth Circuit properly found this far-reaching arbitration clause demonstrated the parties' desire to arbitrate virtually any issue between the parties, even after the contract expired.

National Marine fails to address the exceptional breadth of the arbitration clause. National Marine instead advances its interpretation of the contract clauses implicated by the SIU's grievances, asserting that the Fifth Circuit should have weighed the merits of the SIU's grievances to determine whether National Marine is obligated to arbitrate the disputes after contract expiration. In *Nolde Bros.*, 430 U.S. at 252-53, and most recently in *AT&T Technologies*, 106 S.Ct. at 1419, however, this Court has reaffirmed that the judiciary is not to rule on the potential merits of the underlying grievances, for the parties have bargained for an arbitrator to perform this function. The court below correctly refused to place itself in the arbitrator's stead and examine the merits of the grievances.

Nor, as National Marine contends, must the decision of the Fifth Circuit be reversed because it conflicts with the "general principles of contract law" (Pet.Br. at 16.) A collective bargaining agreement is not an ordinary contract and the general principles of law governing an ordinary contract do not necessarily apply to labor contracts. *John Wiley & Sons*, 376 U.S. at 550 (compelling an

"unconsenting successor to a contracting party" to arbitrate a dispute arising after the expiration of the agreement.)

Three times this Court has held that an employer is obligated to arbitrate grievances which arise after the expiration of an agreement. The court of appeals' decision is in conformity with this precedent.

B. THERE IS NO INTER-CIRCUIT CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS WHICH WARRANTS REVIEW BY THIS COURT

National Marine contends that the decision below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Teamsters Local 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir.) *(en banc)*, *cert. denied*, 107 S.Ct. 647 (1986). There, the Eighth Circuit Court of Appeals stated that "for a right to arbitration to exist the grievance must either involve rights which to some degree have vested or accrued during the life of the contract and merely ripened after termination, *or relate to events which have occurred at least in part while the agreement was still in effect.*" (emphasis added.) *id.*, 795 F.2d at 1403.[3] Plainly, the Eighth Circuit did not, contrary to National Marine's intimations, limit postcontract arbitrability to only "accrued" rights.

As the court below stated, the SIU's grievances arose out of actions taken by National Marine during the life of the agreement, and were lodged, as was the demand

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[3] The rule for arbitrability enunciated by the Fifth Circuit is virtually identical to the rule set forth by this Court in *Nolde Bros.*, 430 U.S. at 251-52, 258: "disputes grounded on a collective bargaining agreement containing an arbitration clause are arbitrable even after expiration of the agreement unless the arbitration clause states otherwise." (Pet.App. at A-11.)

for arbitration, prior to the expiration of the agreement. (Pet.App. A-10.) Thus, the SIU's grievances are arbitrable under both the Fifth Circuit's and the Eighth Circuit's holdings. Both have rejected National Marine's position that only accrued rights are arbitrable following the contract's expiration. To the extent they may be at variance, certiorari is not warranted since the result is the same under either court's interpretation of *Nolde Bros.* Rather than being in conflict, these circuit courts of appeals are in substantial accord.[4]

C. AS INSTRUCTED BY THIS COURT'S PRECEDENTS, THE FIFTH CIRCUIT COURT OF APPEALS REFUSED TO RULE ON THE MERITS OF THE SIU'S GRIEVANCES

In *AT&T Technologies*, this Court reaffirmed that the inquiries and principles set forth in the *Steelworkers Trilogy*[5] are to be utilized to determine whether an employer is required to arbitrate a grievance. Briefly stated, the judiciary:

(1) is to determine whether an employer has agreed to submit a dispute to arbitration;

(2) is to determine whether the collective bargaining agreement creates a duty to arbitrate the particular grievances;

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[4] For these reasons, the decision of the Fifth Circuit is in harmony with the decision of the National Labor Relations Board (herein, "the NLRB") in *Indiana & Michigan Electric Co.*, 284 N.L.R.B. No. 7 (May 29, 1987), *petition for review pending*, Dkt. No. 87-1247 (D.C. Cir.).

[5] The *Steelworkers Trilogy* is: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

(3) is not to rule on the potential merits of the grievance; and

(4) is to order arbitration where a contract contains an arbitration clause, because arbitrability is presumed unless it may be said with "positive assurance" that the arbitration clause is not susceptible of an interpretation which covers the grievances.

106 S.Ct. at 1418-1419.

The Fifth Circuit applied each of the foregoing principles to determine whether the SIU's grievances were arbitrable, after having concluded the Company's obligation to arbitrate disputes continued past the contract's expiration date.[6] The court found the arbitration clause to be "as broad as any we have seen;" it covers virtually any type of dispute between the parties.

It also appropriately refused National Marine's request to delve into the merits of the grievance in determining "substantive" arbitrability. For it is axiomatic that "'[t]he courts...have no business weighing the merits of the grievance, considering whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *AT&T Technologies*, 106 S.Ct. at 1419, quoting *American Mfg. Co.*, 363 U.S. at 568.

That the SIU filed unfair labor practice charges with the New Orleans Regional Office of the NLRB which were

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[6] While National Marine challenges the Fifth Circuit's two-step approach (i.e., whether the Company was obligated to bargain after contract expiration and if so, whether the grievances were arbitrable), it was essentially the approach suggested by this Court in *Nolde Bros.*

subsequently withdrawn does not in any respect preclude the arbitration of the SIU's grievances. Issues raised before the NLRB may be concurrently arbitrated. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Smith v. Evening News Ass'n*, 371 U.S. 195, 197-98(1962).

CONCLUSION

In summary, the decision of the court below was in full accord with the decisions of this Court, and of the courts of appeals. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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